the allegations of the answer, to which the demurrer was directed, the market agency is required by the Act to receive and sell, without discrimination, all livestock consigned and shipped to it for sale, at rates and charges for such service, approved by the Secretary of Agriculture.

"This decision holds that the market agency is liable to the mortgagee under the facts stated, on the ground that the recording in Meade county gave it constructive notice of the mortgage. Furthermore, it is said in the opinion that if the cattle, while located in Texas, had been mortgaged and the mortgage there recorded where the mortgagor and mortgagee were residents, and the cattle had later been brought into this state, without the consent of the mortgagee, the mortgage lien would be here recognized even though the mortgage had not been recorded in Kansas, this being done under the rule of comity between the states (citing *Handley* v. *Harris*, 48 Kan. 606, 29 P. 1145, 17 L.R.A. 703, 30 Am. St. Rep. 322)

"The primary question here presented is whether the imposition of such a liability upon the market agency constitutes a valid exercise of police power by the state, or whether it constitutes, under the law and the realities of the situation, an unlawful burden upon interstate commerce.

"It would be pertinent in determining this question to review the expanding exercise by the Congress in recent decades of its regulatory power under the commerce clause of the constitution. That would require an extended discussion of various Federal enactments and a collection and analysis of Federal cases not now feasible. In the brief of appellee are cited some of the leading decisions upholding various enactments which constitute this legislative chain. Special atten-

tion is called to *Stafford* v. *Wallace,* 258 U.S. 495, 42 St. Ct. 397, 406, 66 L. Ed. 735, 23 A.L.R. 229, in which the validity of the Packers and Stockyards Act, 42 Stat. 159, 7 U.S.C.A. Secs. 181-229, was upheld, and to which further reference will presently be made. In the opinion in the *Stafford* case, extended reference is made to the *Swift* case. *Swift and Company* v. *United States,* 196 U.S. 375, 25 S. Ct. 276, 49 L. Ed. 518. It was there said that 'The principles of the *Swift* case have become a fixed rule of this court in the construction and application of the commerce clause', and the case of *Lemke* v. *Farmers' Grain Co.,* 258 U.S. 50, 42 S. Ct. 244, 66 L. Ed. 458, was cited as the then latest expression on the subject. It was said further in the *Stafford* case: 'It is manifest that Congress framed the Packers and Stockyards Act in keeping with the principles announced and applied in the opinion in the *Swift* case.' And that 'the act deals with *the same current of business,* and the *same practical conception* of interstate commerce.' (Italics supplied.)

"An oft-quoted statement from the *Swift* case, *supra,* is as follows: 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.' Page 398 of 196 U.S., page 280 of 25 S. Ct.

"In the *Stafford* case, *supra,* upholding the validity of the Act, it was further said:

" 'The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still, as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

• • •

" 'The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, *and must be promptly sold and disposed of and moved out, to give place to the constantly flowing traffic that presses behind.* The stockyards are but a throat through which the current flows, and the *transactions which occur therein are only incident to this current* from the West to the East, and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. *The commission men are essential in making the sales, without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but on the contrary, being indispensible to, its continuity.*

• • •

" '*The stockyards and the sales are necessary factors in the middle of this current of commerce.*

" 'The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the west to the consumers in the East.' (Italics supplied.) Page 514 of 258 U.S., page 401 of 42 S. Ct.

"Statements of like import might be quoted from many other decisions.

"Under the authority and direction of the Act, Wichita market has been designated as a public market and made subject to Federal regulation. Each market agency there operating must be registered (sec. 203), must give bond (Sec. 204), and must furnish reasonable stockyard services 'without discrimination' (Sec. 205), at rates or charges that are 'just, reasonable and nondiscriminatory' (Sec. 206), which rates and charges must be filed with the Secretary of Agriculture and subject to his approval (Sec. 207). I do not understand that the appellant questions these statements as to the provisions of the Act. The public stockyards, so designated under the Act, and the market agencies there operating have been repeatedly declared to be public utilities. See among many cases that might be cited, the *Stafford* case, *supra; Farmers' Livestock Commission Co.* v. *United States, D. C.*, 54 F. 2d 375, and the many cases therein cited, page 379; *United States* v. *American Livestock Commission Co.*, 279 U.S. 435, 49 S. Ct. 425, 73 L. Ed. 787; *Atchison T. & S. F. R. Co.* v. *United States*, 295 U.S. 193, 55 S. Ct. 748, 79 L. Ed. 1382. A market agency rendering services under the Act thus performs, as a public utility, a necessary service incident to a continuous flow of livestock from pro-

ducer to consumer. The market agency is not free to act as it will. It cannot choose those from whom it will take consignments or those to whom sales will be made. It must of necessity act promptly. As stated in the *Stafford* case, *supra,* the thousands of head of livestock which arrive daily must be promptly disposed of 'to give place to the constantly flowing traffic that presses behind.' It cannot buy and sell with such profit as it can obtain. Its transactions are at rates whose fairness and reasonableness may be determined by Federal authority.

"So much for the purposes and the provisions of the Act which, in my opinion, have not been given proper weight by this decision.

"Now let us look for a moment at the practical aspect of the situation. By this decision we say that a market agency, operating within the limitations imposed by the Act, with no knowledge that anyone anywhere has a mortgage lien upon livestock consigned to it for sale, and with no reason to suspect that the shipper and consignor does not have the right to sell the cattle, is bound by constructive notice not only of a mortgage on the cattle recorded in any county in Kansas, but recorded in Texas, New Mexico, or elsewhere from which the constant flow of cattle comes. That view ignores realities. How can the market agency, before accepting the cattle 'without discrimination' as it must, protect itself by any sort of inquiry, within any reasonable time? To say that it must do so in one case, is to say that it cannot be safe unless it does so in all cases. In my opinion, that places a very heavy burden upon the market agency in the discharge of its duties under the Act.

"It is conceded that common carriers are not liable to lien-holders in the absence of actual knowledge. They are not bound by constructive knowledge of recorded mortgages. The same immunity applies to grain warehousemen who perform services incident to interstate movements of grain. Appellant distinguishes the cases on the ground that in the case of common carriers and warehousemen, title does not pass. It is said in the instant opinion that it was made clear in the *Stafford* case, *supra,* that the 'purchase or sale of livestock by commission companies at the stockyards was a transfer of title to the livestock.' Certainly, if the market agency is itself a buyer of livestock it takes title, and passes title when it subsequently sells. But I do not at all read the *Stafford* case as saying that in cases where the market agency receives for sale upon commission it takes title. The statement in the opinion that 'the sales * * * create a local change of title, it is true, but they do not stop the flow' relates to sales made by the market agency. The sales, it is there said 'do not stop the flow * * * not interfering with, but, on the contrary, being indispensable to, its continuity.' Furthermore, the appellant here does not contend that title passes *to* the market agency. It says in its brief: 'The transaction here in question is not a mere bailment but more in the nature of a consignment for sale and has many of the elements of sale. *We do not mean by this that title passes to the commission merchant,* but certainly the title passes through him * * * '. (Italics supplied.) However, even if we assume, and that only, that title resides, during a brief transitory period, in the market agency, that is wholly incidental to the intermediary service which it renders. I see no fundamental rea-

son, if we are to be realistic, for relieving the railroads from liability and imposing it upon the market agency. Both are essential links in the chain of commerce. In fact, there appears to be less reason to impose constructive notice upon the market agency than upon the railroad. With much less trouble, the railroad can make inquiry to find, at least, whether there are any recorded liens in the county where the traffic originates before accepting the livestock for shipment. The market agency necessarily handles live stock coming often from far distant points, in many states.

"It is of course well settled that no state can place any undue burden upon interstate commerce. In the *Lemke* case, *supra*, the state of Minnesota attempted to regulate the buying of grain at the great grain markets in that state, through which most of the grain moved in interstate commerce. It was contended that the regulations were valid as an exercise of police power by the state. But the United States Supreme Court, following the principle and its limitations as stated in the Minnesota Rate Cases (*Simpson* v. *Shepard*, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L.R.A., N.S., 1151, Ann. Cas. 1916A, 18), that 'this principle has no application where the state passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it' (258 U.S. 50, 42 S. Ct. 247), invalidated the state act.

"The appellant does not discuss the question of whether the imposition upon the market agency of the constructive notice, here at issue, would burden interstate commerce. We shut our eyes to the conditions under which marketing operations at the great livestock markets are of necessity conducted, involving integrated and fast-moving transactions, if we visualize no real

burden, by such an imposition. The required acceptance of consignments of livestock often crowding the market and demanding expeditious handling, permits no substantial delay if the service of bringing buyer and seller together is to be well performed. What sort of inquiries must it make in order to escape liability to some unknown mortgagee? How wide a territory must it include in the scope of its delaying inquiries? Only in Meade county in the instant case, or in other Kansas counties as well? Or also in Texas, although this record does not show that it knew the shipper ever lived in Texas? I submit that the burden here imposed upon the interstate operations of the regulated markets is a grave one, tending to delay and impede the service they are instituted to perform. Market agencies cannot be expected to perform expeditious service at the constant risk of great and unknown liabilities. If so, all buyers and sellers must assume the burden of comission fees on an insurance basis to cover the risk. I do not believe any such result was contemplated by the Act.

"Attention must be given to one other important matter in this case. In its original brief, the appellant cited and quoted at some length from *Brown* v. *Campbell Co.*, 44 Kan. 237, 24 P. 492, 21 Am. St. Rep. 274, in support of its contention that under our decisions a commission merchant handling cattle without actual notice of a mortgage lien is bound by constructive notice of a recorded mortgage and becomes liable to the mortgagee as for a conversion of the property. But the *Brown* case loses all force on the point here at issue in view of what was said in the later case of *Greer* v. *Newland*, 70 Kan. 315, 78 P. 835, 70 L.R.A. 554, 109 Am. St. Rep. 424. In that case there was a

rehearing and second opinion, the first opinion being reported at 70 Kan. 310, 77 P. 98, 70 L.R.A. 554, 109 Am. St. Rep. 424. In its reply brief, appellant seeks to minimize the import of the opinion in the *Greer* case, and quotes largely from what was said in the first opinion. The case did involve, as noted by appellant, the question of whether a commission merchant under the facts there shown, derives such a benefit from selling mortgaged cattle, without actual notice, as to authorize the mortgagee to waive the tort and recover upon an implied contract. But the case dealt directly with the question of constructive notice. What had been said on that question in the first opinion was the very thing that led to the rehearing. In the opinion upon rehearing it was said: 'Upon a former hearing it was held that they derived no such benefit from the act of conversion as to make them liable in assumpsit by reason thereof, but that under the authority of *Brown* v. *Campbell Co.*, 44 Kan. 237, 24 P. 492, 21 Am . St. Rep. 274, the record operated to give them constructive notice of the mortgage, and that this had the same effect as actual notice, and render them liable as upon contract for their failure to pay the proceeds of the property to the real owner. A grave doubt as to the correctness of this view of the effect of the record led to the granting of a rehearing.

" 'Upon fuller consideration, we are convinced that all that is said in the case cited regarding the notice imparted by the record of the mortgage is dictum.' Pages 315, 316 of 70 Kan., page 835 of 78 P.

"The court then went on to discuss specifically the question of whether under our mortgage registration law the recording of a chattel mortgage imparts constructive notice to a commission merchant to whom the

mortgaged property is sent for sale. It was held, for reasons not necessary here to recite, that he is not so bound under our recording statutes. Syllabus 1, which deals with the question referred to by appellant, as above stated, was modified to conform to the opinion upon rehearing, and syllabus 2 was added, reading as follows: 'The filing of a chattel mortgage for record does not impart constructive notice to a commission merchant to whom the mortgaged property is sent for sale, and who sells it and pays the proceeds, less his commission, to his consignor.' As far as we have been able to discover, *Greer* v. *Newland, supra,* has never been overruled or modified and has stood unchanged for forty-four years. In connection with somewhate different issues but bearing directly upon limitations as to constructive notice under our recording statutes it was cited with approval in *Rawlins County State Bank* v. *Walters,* 92 Kan. 391, 140 P. 864, and in *Farmers' State Bank of Inman* v. *Bank of Inman,* 123 Kan. 238, 254 P. 1038.

"If a commission merchant prior to enactment of the Packers and Stockyards Act, who handles livestock on a commission, was not bound by constructive notice of a recorded mortgage, how much more must that be true as to a commission market agency now operating as a public utility within the limitations of the Act? Appellant calls attention to the fact that *Brown* v. *Campbell Co., supra,* repudiated in the *Greer* case, *supra,* as to constructive notice was later cited with approval in *Gafford Lumber & Grain Co.* v. *Eaves,* 114 Kan. 576, 220 P. 512. Examination of the *Eaves* case

will show that such citation has little, if any, pertinency here. In the *Eaves* case a lumber company was held to be bound by notice of a recorded mortgage being in possession of facts which fairly put it upon inquiry. No such circumstances are present here.

"This statement must be concluded without discussion of other isues involved in the instant case.

"The judgment of the trial court should be affirmed.

"WEDELL and BURCH, JJ., concur in the foregoing dissent."

Material statements contained in the decision of the Supreme Court of Washington in the case of *Moderie* v. *Schmidt et al.*, 6 Wash. (2d) 592, at pages 597, 598, 108 Pac. (2d) 331, at page 334, as to the reasons why that court rendered its decision in said case:

"The trial court's opinion was pronounced before the recent opinion in *Mason City Production Credit Ass'n* v. *Sig Ellingson & Co.*, 205 Minn. 537, 286 N.W. 713, 716, appeared in the law reports. In this case, the court distinguished the common carrier cases relied on by respondents in this case, and, in discussing the Packers and Stockyards Act, said, in part: '• • • There is no indication in the history of this legislation nor in the act itself of an intention to shield either purchasers or market agencies from liability on account of wrongful sales in the stockyards of livestock not owned by the consignors or covered by chattel mortgages of which the purchasers or market agencies may be in fact ignorant. • • •'

"The Supreme Court of the United States denied a petition for a writ of certiorari (308 U. S. 599, 60 S. Ct. 130, 84 L. Ed. 501), and later, a motion for a rehearing of the petition (308 U.S. 637, 60 S. Ct. 178, 84 L. Ed. 529). We note that the solicitor general of the United States appeared in the Supreme Court and opposed the granting of the writ. It seems reasonable to infer that the decision of the Minnesota Supreme Court was satisfactory to the federal authorities charged with the administration of the Packers and Stockyards Act.

"The opinion in the *Ellingson* case has recently been followed in *First National Bank of Pipestone* v. *Siman*, S.D., 289 N. W. 416.

"The judgment appealed from is reversed, with directions to enter judgment for the plaintiff."

In the *Columbia Law Review*, issue of July, 1947, Volume 47, Page 862, 863, the author, in speaking of the decision of the Supreme Court of Iowa in the case of *Birmingham* v. *Rice Bros.*, 238 Iowa 410, 26 N. W. (2d) 39, said:

> "The choice between these arguments must be bottomed on considerations of social convenience. The legislative policy expressed in the Packers and Stockyards Act aimed to remove obstructions to the flow of commerce in the meat industry. To demand that the agent investigate the source of his principal's title in all cases, may impede materially the vast majority of transactions in which the title is unquestionably valid. Secondly, since the agent must serve all reasonable requests without discrimination, his freedom to investigate, while not destroyed, is inhibited by the fear that his examination of his principal's title may be characterized as discriminatory, leading to his suspension. Finally, the Act, by rendering the agent's fees subject to administrative regulation, makes it difficult for him to spread the risk of loss by increasing the price of his services. It would seem that the decision of the Iowa court in the instant case, while well buttressed by authority, fails to give adequate weight to the social aims which the Packers and Stockyards Act was intended to serve."

REPRODUCTION OF ARTICLE APPEARING IN IOWA LAW REVIEW, ISSUE OF OCTOBER, 1947, AND PERMANENTLY IN VOLUME 32, PAGES 755 TO 760, INCLUSIVE, OF SAID IOWA LAW REVIEW.

COMMENTS ON RECENT CASES

Agency — Liability of Factor for Innocent Conversion — Effect of Packers and Stockyards Act. — *P* sued *D*, a livestock commission broker in the Sioux Falls stockyards, for damages for wrongful conversion of cattle. The cattle had been purchased by *X* from *P*, a livestock dealer in the Sioux City stockyards. In exchange for the cattle *X* gave *P* a check which proved to be worthless. *X* represented to *P* that he was buying the cattle to feed them on his farm, but instead *X* took them immediately to *D* in Sioux Falls where *D* resold the cattle in good faith and without notice of *P's* claim of ownership. The proceeds of the Sioux Falls sale by *D* were handed over to *X*. In the district court a verdict was directed for *D*. On appeal, *held*, judgment reversed. *D* is liable on common-law principles of agency for conversion in that he assisted *X* in perpetrating the wrong on *P*. *D's* defenses that he acted in good faith and without notice of *P's* claim of ownership of the cattle and that he was absolved from liability because acting under the Packers and Stockyards Act were rejected. *Birmingham v. Rice Bros.*, 26 N.W. 2d 39 (Iowa 1947) (4 justices dissenting).

The general common-law rule is that where an agent sells personal property in good faith and without knowledge of the lack of the right to sell in his principal,[1] he will nevertheless be liable for

[1] The majority opinion states at the outset that "unquestionably" title did not pass from P by reason of the fraud practiced by *X* on *P*. From the opinion it cannot be ascertained whether the result of the case would be otherwise if a voidable title had passed to *X*. Nonetheless, the possibility that *X* obtained at least voidable title would seem to have been too summarily dismissed in view of well-reasoned authority to the contrary. See Goodlett, *The Effect of Accepting a Worthless Check Where the Parties Contemplate a Cash Sale*, 28 KY. L. J. 322 (1940). Professor Williston contends that title does pass when a worthless check is given for goods in the absence of an agreement to the contrary. 3 WILLISTON, CONTRACTS § 732 (Rev. ed. 1936); 1 WILLISTON, SALES § 346(a) (2d ed. 1924). Sections 18 and 19 of the Uniform Sales Act indicate that property in specific goods passes, in the absence of a contrary intention, at the time of the contract to sell, regardless of when payment is to be made. IOWA CODE §§ 554.19, 554.20 (1946). In the instant case there does not seem to have been any intent that *P* retain title. In fact, testimony given by *P* on cross-examination was to the effect that he thought the cattle were paid for when he accepted the check. Record, p. 17. If title did pass to *X* subject to be avoided by *P*, Section 24 of the Uniform Sales Act indicates that the buyer of the cattle at the sale conducted by *D* got such title that *P* could not recover from him. IOWA CODE § 554.25 (1946). If that is admitted, it is difficult to see how *P* could re-

assisting his principal in the conversion of the goods.[5] The rationalization of the rule seems to be that the risk of such liability for innocent conversion is incurred by one who sets himself up as a factor to handle goods for the marketing public. In this state of authority there would seem to be little doubt as to the correctness of the decision if *D* were a private entrepreneur operating under the ordinary rules applicable to private enterprises. In the principal case, however, *D* was subject to the provisions of the Packers and Stockyards Act of 1921.[6] Section 304 of that Act states that "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard."[7] A denial of a reasonable request for the use and benefit of stockyard service subjects a market agency guilty of the denial to liability to the person injured thereby for the full amount of damages sustained in consequence of such violation.[8] That the Packers and Stockyards Act makes a licensed market agency, such as *D* in the instant case, a public utility is well established and is not denied by the court.[9]

The majority opinion invokes the support of decisions of three

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cover from *D*, a mere conduit in whom title never vested. The *Restatement of Agency*, § 349 of which is quoted approvingly by the court, declares in comment *g* under that section that ". . . an agent who, without notice of the fraud, sells goods, title to which his principal has obtained by fraud, is not liable to the defrauded owner." RESTATEMENT, AGENCY § 349, comment *g* (1933). Thus, if voidable title did pass to *X*, there is respectable authority for absolving the agent from liability.

[5] Flannery v. Harley, 117 Ga. 483, 43 S.E. 765 (1903); Hoven v. McCarthy Bros. Co., 163 Minn. 339, 204 N.W. 29 (1925); Johnson v. Martin, 87 Minn. 370, 92 N.W. 221 (1902).

[6] 42 STAT. 159, 7 U.S.C. § 181 (1940).

[7] 42 STAT. 164 (1921), 7 U.S.C. § 205 (1940). Section 307 also states that "It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." 42 STAT. 165 (1921), 7 U.S.C. § 208 (1940).

[8] 34 OPS. ATT'Y GEN. 267 (1923); *see* Farmers' Livestock Comm'n Co. v. United States, 54 F. 2d 375 (E. D. Ill. 1931).

[9] "The act . . . treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East." Stafford v. Wallace, 258 U.S. 497 (1923).

[7] Mason City Production Credit Ass'n v. Sig Ellingson & Co., 205 Minn. 537, 286 N.W. 713 (1939), *cert. denied*, 308 U.S. 599 (1939); First Nat. Bank of Pipestone v. Siman, 67 S.D. 118, 289 N.W. 416 (1939); Moderie v. Schmidt, 6 Wash. 2d 592, 108 P. 2d 331 (1940).

[8] Blackwell v. Laird, 236 Mo. App. 1217, 163 S.W. 2d 91 (Kan. City 1942); Creswell v. Leftridge, 194 S.W. 2d 48 (Springfield Mo. App. 1946).

state courts[7] which refused to relieve market agents from liability for conversion, while explaining away two Missouri cases[8] and an older Kentucky decision[9] as progeny of a disapproved minority doctrine which protects the agent rather than the innocent third party whose goods are sold without his consent.[10] It seems to be

[9] Abernathy v. Wheeler, 92 Ky. 320, 17 S.W. 858 (1891).

[10] There appears to be an irreconcilable conflict between two lines of authority rather than a majority and minority view if the position of factors as public utilities is regarded as presenting a different problem from that of a common-law agent who innocently assists his principal in conversion. In Mason City Production Credit Ass'n v. Sig Ellingson & Co., 205 Minn. 537, 286 N.W. 713 (1939), the case on which the court in the instant case largely relied, the factor sold stock which was subject to a recorded chattel mortgage and the court charged the factor with constructive notice of P's claim. Such a case presents strong equities in favor of a plaintiff because of the need to give effect to recording statutes and because the plaintiff was innocent of any act which might be construed as abetting the wrongdoer. The South Dakota court followed the Minnesota doctrine on substantially the same facts in First Nat. Bank of Pipestone v. Siman, 67 S.D. 118, 289 N.W. 516 (1939). In Moderie v. Schmidt, 6 Wash. 2d 692, 108 P. 2d 331 (1940), the plaintiff had delivered cattle to a drover for shipment and at the same time gave him an instrument directing that $447 of the selling price be mailed to the plaintiff and the balance be paid the drover. A state brands inspector at the stockyards, to whom commission merchants looked for information regarding ownership, construed the instrument as a bill of sale from plaintiff to the drover. The defendant commission merchants sold the cattle and delivered the proceeds in full to the drover who absconded. The court relied on the *Sig Ellingson* case in holding the defendants liable.

On the other hand, in Abernathy v. Wheeler, 92 Ky. 320, 17 S. W. 858 (1891), the Kentucky court held that a public warehouseman who sold tobacco consigned to him by a mortgagor was not liable to the mortgagee even though the mortgage was recorded. After noting that the warehouseman was obliged to receive and sell tobacco for the entire public, the court argued that "it would not be in the interest of trade to require [public warehousemen] to institute inquiry and investigation before sale as to the true condition of the title to the tobacco." 92 Ky. at 323, 17 S.W. at 859. In 1942 the Kansas City, Mo., Court of Apeals in Blackwell v. Laird, 326 Mo. App. 1217, 163 S.W. 2d 91 (1942), was confronted with a case which would seem to present a situation even more favorable to recovery than the mortgage cases. In that case the cattle had been stolen from the true owner apparently without any fault or failure on his part. In spite of the cases holding the agent liable where there were lesser equities in favor of the plaintiff, it was held that the factor was not liable as a converter, reliance being placed on the distinction between one required by law to render specific services to the public and one who has a choice of serving or refusing to serve. A Missouri appellate court gave effect to the distinction again in Cresswell v. Leftridge, 194 S.W. 2d 48 (Springfield Mo. App. 1946), relieving a commission merchant from liability for conversion of cattle allegedly stolen from plaintiff and delivered to the merchant for sale. In Drovers' Cattle Loan & Inv. Co. v. Rice, 10 F. 2d 510 (N.D. Iowa 1926), the court dismissed an action for conversion of

an oversimplification, however, to insist that cases declining to impose liability on the agent who has innocently converted represent a minority view. A number of courts adhering to the general common-law agency rule have allowed such factors as the relative innocence of the parties,[11] the nature of the property,[12] and the character of the agency involved[13] to lead to a different result.[14] The statutory obligation of *D* to furnish reasonable stockyard services on "reasonable request" would seem to be a factor of significance warranting re-examination of the common-law rule before applying it to such a defendant.

There is nothing in the present case to indicate that *X's* request for services was other than reasonable. It would appear therefore that *D* could not have refused to accept *X's* business without incurring a risk of liability for the damages imposed by the Act. The majority opinion, however, suggests that a marketing agency operating under the Act has a recognized right to require some reasonable showing by those desiring to avail themselves of the

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cattle brought by a mortgagee of the cattle against the same defendant who was involved in the principal case. The court held that defendants were not liable if they acted in good faith and that "the South Dakota [recording] statute did not give defendants constructive notice of plaintiff's rights." 10 F. 2d at 512.

In the principal case the Iowa court was presented with a set of facts which would seem to present a weaker justification for a recovery by *P*, himself a livestock dealer, than in any of the cases above cited, since *P's* lack of care helped to set the wrongful scheme in motion.

[11] Thoms v. D. C. Andrews & Co., 54 F. 2d 250 (C.C.A. 2d 1931) (freight forwarder not liable to purchaser of goods when the forwarder complied with the seller's instructions to deliver goods to seller's agent rather than purchaser); Wando Phosphate Co. v. Parker, 93 Ga. 414, 21 S.E. 53 (1893) (defendant in possession of note for collection purposes only held not liable in trover where he refused to deliver note to true owner but allowed his principal to recover possession; plaintiff had put note in hands of converter for collection and converter had sold it to defendant's principal).

[12] Pratt v. Higginson, 230 Mass. 256, 119 N.E. 661 (1918) (stockbroker, who as agent for agent of thief sold negotiable bond payable to bearer, protected); Gruntal v. United States Fidelity & Guaranty Co., 254 N.Y. 468, 173 N.E. 682 (1930) (stockholder not liable for conversion for selling for thief's account negotiable corporate bonds payable to bearer).

[13] Rogers v. Huie, 2 Cal. 571 (1852) (auctioneer held not liable in conversion for selling stolen goods and turning over proceeds to the felon); Metcalf v. McLaughlin, 122 Mass. 84 (1876) (teamster held not liable in conversion for moving mortgagor's chattels without mortgagee's consent, even though mortgagee sought to prevent removal and gave teamster notice of his claim); Greenway v. Fisher, 1 Car. & P. 190, 171 Eng. Rep. 1157 (N.P. 1824) (packer not liable in trover for shipping goods of plaintiff although he made affidavit at custom house that he was real owner).

[14] RESTATEMENT, AGENCY § 349, comment *g* (1933). See 4 U. OF PITT. L. REV. 46 (1937).

agency's services that each proposed transaction is a legitimate one which the other party has the right to make. Thus, one proposing to deal with the agency may be required to establish his identity and his ownership of the stock involved. But such a rule must, under the Act, be nondiscriminatory and otherwise just and reasonable. Accordingly, the market agency, in order to protect itself against the liability imposed by the Iowa court, must require a showing of title or right of disposition of all property offered for sale. The adoption of a rule effective enough to have uncovered the fraudulent scheme of *X* here would likely be so obstructive of the very processes the Act was designed to facilitate as to run afoul the Act's requirement that an agency's regulations and practices be reasonable. At any rate it would require a substantial modification of the procedures now prevailing at most stockyards. The majority does not deny that this may be so, but is nevertheless satisfied that the common-law rule of liability of a factor for innocent conversion was not intended by Congress to be abrogated. It is of course dubious that Congress had any discoverable intention one way or the other.

It would appear that as between the parties in the instant case the position of *D* is stronger than that of *P* who, without any statutory or other obligation, delivered property unconditionally to *X* for a worthless check. To shift the burden of *P's* loss to *D*, who had no basis for refusing *X's* request for his services, involves a complete disregard for the respectable doctrine that as between two innocent parties victimized by fraud he who placed the wrongdoer in the position to perpetrate the fraud on the other party should bear the loss.[15]

Since the court in the principal case refuses to be diverted into any consideration of the relative degrees of innocence of the parties, it is to be assumed that the result would not have been affected by a demonstration that *D* could not by any reasonable means have discovered *X's* nefarious scheme. The majority is apparently content that liability for sales of stock by stockyard agents without consent of the true owner become a risk of the commission business. The opinion intimates that a construction of the Packers and Stockyards Act so as to relieve market agencies against such liability would encourage and protect the operation of "fences" for handling stock stolen or acquired through fraud. The rationale would seem to be that it is better that an innocent agency be penalized for selling stock without notice of a stranger's claim thereto than that the agency be enabled with impunity to put into the stream of commerce and beyond effective recovery an owner's stock taken from him by a thief or fraudster. The court perhaps presumed that the agency can pass on the cost of protecting itself against this risk by adding it to the expenses which go to make up its charges.[16]

[15] Carpenter v. Longan, 83 U.S. 271 (1872).

[16] If the agency seeks to pass along the cost of carrying this risk rather than absorbing it, compliance must be had with § 306 of the Packers and

while *P* would have to bear the entire loss. Though the rule appears to be harsh from the viewpoint of the agency, the court does avoid imposing the burden, perhaps insuperable in most cases, of requiring the true owner to prove that a commission agent had guilty knowledge of his principal's lack of title or authority to sell.[17]

Chattel Mortgages — Purchase-Money Mortgages — Necessity for Recordation. — In 1936, plaintiff obtained a judgment against defendant. On September 28, 1942, defendant executed a chattel mortgage to a bank on certain cattle. Two days later the mortgage was filed for record, but the filing was ineffective due to indefinite description of the mortgaged cattle and failure to give their location. On December 8, 1942, without notice of the mortgage, plaintiff caused execution to issue and be levied on the cattle. The mortgagee bank intervened, contending that its mortgage was for purchase money and as such was good against plaintiff even though not properly recorded. On appeal from a judgment for the mortgagee, *held*, reversed. A purchase money mortgage is not excepted from the requirements of the chattel mortgage recording statute, Section 556.3 of the Iowa Code (1946). *Yetley v. Irons*, 25 N.W. 2d 677 (Iowa 1947).

The Iowa recording statute makes unrecorded chattel mortgages invalid as against "existing creditors and subsequent purchasers without notice."[1] "Existing creditors" are creditors who have acquired liens by attachment or execution.[2] Those who acquire their claims after the execution of the mortgage but before its recordation become "existing creditors" if they obtain their liens in time.[3] Administrators of insolvent decedents' estates are also protected

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Stockyards Act, 42 STAT. 164, 7 U.S.C. § 207 (1940), requiring the filing of a schedule of rates with the Secretary of Agriculture and the giving of public notice of all rates. New rates or charges are subject to suspension by the Secretary of Agriculture under subd. (e) of this section.

[17] If the view of the Missouri and Kentucky courts is followed (see note 10 *supra*), *P's* only basis for recovery is that the factor has dealt with *P's* goods with notice of *P's* ownership. Drovers' Cattle Loan & Inv. Co. v. Rice, 10 F. 2d 510 (N.D. Iowa 1926).

[1] The words "without notice" apply to creditors as well as to purchasers. Allen v. McCalla, 25 Iowa 464 (1868). A subsequent purchaser is one who gives present consideration. Chariton & Lucas County National Bank v. Taylor, 210 Iowa 1153, 232 N.W. 487 (1930). The term includes subsequent mortgagees. Central Trust Co. v. Stepanek, 138 Iowa 131, 115 N.W. 891 (1908).

[2] Martin v. Fritz, 194 Iowa 710, 190 N.W. 314 (1922); Stewart & Brown v. Smith, 60 Iowa 275, 14 N.W. 310 (1882); JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES § 245 n. 90 (6th ed. 1933).

[3] Goll & Frank Co. v. Miller, 87 Iowa 126, 54 N.W. 113 (1893); Fox v. Edwards, 38 Iowa 215 (1874).

JAN 28 1953
HAROLD B. WILLEY

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

NO. 520

SIG ELLINGSON AND COMPANY, a Corporation,
Petitioner,

vs.

E. C. BUTENBACH, d/b/a GARNER SALES COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

QUESTION PRESENTED.

The sole question presented is whether under the Packers and Stockyards Act the petitioner, a market agency, was obliged to sell for Brackey the cattle stolen from the respondent.

SUMMARY OF ARGUMENT.

This case involves merely the issue whether the application of the laws of Iowa and Minnesota (whether voiced by their legislatures or their highest courts) holding a market agency liable to the true owner for conversion where it receives from its principal, livestock to which the principal has no right, title or interest, and does not account to the true owner for the

livestock or its proceeds, conflicts with the Packers and Stockyards Act. This issue will be discussed under 3 points. 1. Purpose of Packers and Stockyards Act. 2. Since Brackey had no right to the cattle, he had no right to have the cattle sold by the petitioner. 3. Since the cattle that Brackey offered to petitioner to sell had been stolen, the same never became a part of interstate commerce. Therefore the Packers and Stockyards Act has no application.

ARGUMENT.

Point I.

The Stockyards and Market Agencies were public utilities before the passage of the Packers and Stockyards Act. That law does not bestow any additional right nor does it take away any lawful right the stockyards and market agencies had that are not in conflict with practices enumerated in the law. The unlawful practices condemned by the Act amounted to unjust discrimination. In *Stafford v. Wallace,* 258 U. S. 495, 516, 42 S. Ct. 397, 402, the Court, in part, said:

> "The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the west to the consumers in the east. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation."

The precise point in issue in the case at bar, is not, as defendant assumes, what regulations the Act imposes upon market agencies, but rather what legal rights, if any, it takes away from the general public. Or stated differently, does the Act supplant the laws of Iowa and Minnesota relating to factors liability for conversion.

The following sections of the Packers and Stockyards Act cover a market agency.

Sec. 201 (c) defines a market agency.

Sec. 203 requires a market agency to register.

Sec. 205 provides, in part, as follows:

> (Sec. 205) "It shall be the duty of every * * * market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services * * *."

This section is declaratory of the common law. *Birmingham v. Rice Bros.* (Iowa), 26 N. W. (2d) 39, 40. In 73 *C. J. S.*, page 997, the rule is stated as follows:

> "Except in so far as such matters may have been regulated by public authority, a public utility has the right to prescribe and adopt rules and regulations for the conduct of its business and the protection of itself against fraud, injury or undue risk and liability and to require compliance therewith by those dealing with it, provided such regulations are reasonable, just, and non-discriminatory and not in contravention of the law. A rule or method is not unreasonale merely because it results in some inconvenience to a class entitled to service."

In *Farmers' Livestock Commission Co., et al. v. United States, et al.* (D. C. Ill.), 54 F. (2d) 375, 382, the court, in part, said:

> "The plaintiffs are not compelled to do business with Producers and N. O. B. except in the usual course of business as conducted at the National Stockyards. Clearly the secretary's order was so intended, and should so be construed. If, in the free and open competitive field, plaintiffs transact business with the two concerns with the same open, untrammelled freedom of commerce as with other agencies of the same character at the same place, the law is satisfied and the order complied with. If the two concerns insist on doing business only upon the 'ticket marking' basis, or upon any other

basis which is not universal, but only exceptional, such action is not protected by the order. The plaintiffs may not, in such exceptional instances or as to such exceptional practices as are part of the usual course of business, refuse to deal."

Sec. 208 provides, in part, as follows:

(Sec. 208) "It shall be the duty of every * * * market agency to establish, observe, and enforce just, reaonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services * * *."

It is only unjust discriminations that are condemned. In *State v. Jacksonville Terminal Co.* (Fla.), 106 So. 576, 587, the court, in part, said:

"The law is designed 'to prevent unjust discrimination' by those rendering public service, and does not forbid just discriminations that are incident to the protection of organic rights (citing cases). In determining whether a practice of a common carrier is unjustly discriminating as to passengers, 'the rights of the carrier are to be considered together with other facts and circumstances affecting the subject.' State ex rel. Railroad Com'rs v. Florida East Coast R. Co., 64 Fla. 112, 59 So. 385."

It is well settled that each state may provide for certain police regulations that do not burden interstate commerce. *Bowman, et al. v. Chicago & N. W. Ry. Co.*, 125 U. S. 465, 501, 8 S. Ct. 689, 700-701. It is also well settled that almost every state law is a police regulation. *Sligh v. Kirkwood*, 237 U. S. 52, 59, 35 S. Ct. 501, 502. Before the enactment of the Packers and Stockyards Act, the laws of the States of Iowa and Minnesota imposed liability regardless of innocence or good intentions in all cases where the agency sold goods which were not the property of the principal. See the District Court's opinion (R. 33-34).

Point II.

Since Brackey had no right to the cattle he had no right to have the cattle sold by the defendant. The defendant as a market agency under Section 208 of the Packers and Stockyards Act had the right to require, and should have required Brackey to establish his right to have the cattle sold by the defendant. In the following cases the courts have discussed this point. It is to be noticed that in so doing, they have sometimes regarded it as so bound up with what plaintiff refers to in his brief as Point 3 that they have not always separated the two points in their discussion. The italics in the quoted sections are ours.

In *Mason City Production Credit Ass'n v. Sig Ellingson & Co.*, 205 Minn. 537, 286 N. W. 713, certiorari denied 308 U. S. 599, a case where the effect of the Packers and Stockyards Act was raised, the court in discussing that act, in part, said:

> "It is hard to believe that Congress by this act intended to take over the entire field of the livestock industry, not only the marketing thereof at the stockyards, *but also to control all the steps of those who raise livestock for such market.* * * * *There is no indication in the history of this legislation nor in the act itself of an intention to shield either purchasers of market agencies from liability on account of wrongful sales in the stockyards of livestock not owned by the consignors or covered by chattel mortgages of which the purchasers or market agencies may be in fact ignorant.* Courts should be slow to conclude that the act was designed to supersede local law respecting the force and effect of chattel mortgage security upon livestock received at public stockyards.
>
> "Defendant contends that this judgment obstructs and unduly burdens interstate commerce and thus violates the commerce clause of the federal

constitution; and also that it deprives defendant of its property and of the equal protection of the law guaranteed by the 14th amendment to that constitution, U. S. C. A. * * *

"If we are right in the conclusion that the Packers and Stockyards Act was not intended to and does not disturb or supersede local or state law in respect to chattel mortgages, the judgment appealed does not contravene the 14th amendment nor any other provision of the federal constitution."

In *Birmingham v. Rice Bros.* (Iowa), 26 N. W. (2d) 39, cert. denied 332 U. S. 768, 68 S. Ct. 79, wherein the Packers and Stockyards Act was very thoroughly considered, the court in that connection, in part, said on pages 42 and 43 as follows:

"Appellee contends the Act requires it, as a public utility, to serve all comers promptly and receive and sell all livestock consigned to it for sale, that it could not select whom it would serve and hence was not liable for selling livestock to which its principal had not title, in the absence of knowledge or notice to it. *The theory is that the Act affects and destroys certain legal rights of members of the public whose livestock may be wrongfully taken to such stockyard by a thief or other wrongdoer and sold for said wrongdoer by his factor.*

"Neither by common law nor any statute (called to our attention) is any public utility required to serve all. The conduct prohibited is always unjust discrimination, unfair rates or practices or unreasonable rules.

"These holdings recognize the right of market agencies to require some reasonable showing that each proposed transaction is a legitimate one which the other party has the right to make. Under the Act, reasonable rules and regulations to this end would be proper. Hence the conclusion is warranted that such an agency is not required to handle stolen livestock or livestock to which the title of its principal is defective and may make reasonable re-

quirements that one proposing to deal with it establish his identity and the ownership of and title to the livestock involved.

"Certainly, Congress did not adopt the Packers and Stockyards Act to encourage and protect the operation of fences for handling property stolen or procured by fraud. The Act merely makes it the duty of such agencies to furnish upon reasonable request without discrimination reasonable stockyard services. It is not wrongful discrimination to refuse to aid a criminal in his crime, nor is a request that one dispose of property fraudulently procured or stolen a reasonable request.

"However, the proposition just considered is not the ultimate one before us. *The precise question here is not what regulations the Act imposes upon market agencies but what legal rights, if any, it takes away from the general public."*

In *Citizen State Bank of Dalhart v. Farmers Union Livestock Cooperat've Co.* (Kan.), 193 Pac. (2d) 636, on pages 642 to 643, the court, in part, said:

"In Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229, is presented a similiar statement of the purposes of the act. It is there pointed out (page 500 of 258 U. S., page 399 of 42 S. Ct.) that the interest of 'bank and cattle loan companies' were taken into account in the preparation of the Act. *The opinion also makes it clear that the purchase or sale of livestock by commission companies at the stockyards was a transfer of title to the livestock.* It would be strange indeed if after all the hearings referred to in the report and the anxious efforts of Congress through its committees to prepare an act to avoid abuses and practices detrimental to the owners of livestock so purchased and sold by the market agencies at the stockyards, that Congress would in effect nullify the statutes of Kansas and other states with respect to the recording of chattel mortgages and the constructive notice that such valid mortgage

so recorded should be rendered nugatory if the purchase is made by a market agency at a stockyards. Assuming the power of Congress to do such a thing, certainly the act should have made it clear that such was one of its purposes. It is not claimed that the wording of the act makes such a result clear.

"We see nothing in the statute which sustains defendant's allegation to the effect that under the Packers and Stockyards Act it is required to sell promptly all livestock shipped to it for sale and pay the shipper the full net price thereof after the judgments, commissions and other proper chargeable items, without making any inquiry into the ownership of the livestock. Indeed, we regard the contention as contrary to the statute and the rules of the Secretary of Agriculture promulgated thereunder. Unless the Packers and Stockyards Act and the rules of the Secretary of Agriculture promulgated thereunder abrogate our statute (G. S. 1935, 58-301), which makes the proper recording of a valid chattel mortgage notice of the mortgage lien to subsequent purchasers, we see no legal reason to say it is not applicable to such a market agency.

"The defendant's argument on this point is not predicated upon the Packers and Stockyards Act, nor upon any rule promulgated thereunder by the Secretary of Agriculture. It is predicated upon the general theory that by the act stockyards are made 'public utilities,' and that the general law of public utilities, as applied to railroads and other public utilities, would relieve them of any duty to take any notice of the recorded chattel mortgage. The argument is far-fetched and lacks substance. The analogy of the relation of a common carrier of merchandise shipped on bills of lading to that of the defendant is not the same. *The common carrier is a bailee of the merchandise; the defendant is a purchaser of it. When defendant purchased the livestock from Jones it became the owner of the cattle; the title passed.*

"We have no occasion here to write a thesis on the law of public utilities, but it may be said that the regulatory statutes pertaining to them are designed to have the business of the utility conducted fairly and without discrimination, but we think that none of them is designed to abrogate valid state laws for the protection of property rights."

In *Allen C. Driver, Inc., et al. v. Mills* (C. A. Md.), 86 Atl. (2d) 724, wherein a market agency set up by the Packers and Stockyards Act as a defense for conversion growing out of the sale of five head of stolen cattle, the court, on page 726, in part, said:

"While it is a general principle that a public utility is under a legal obligation to render adequate and reasonably efficient service impartially and without unjust discrimination, *a market agency is certainly not required to handle stolen livestock or livestock to which the title is defective.* We assume that an agency could demand that any person desiring to deal with it must establish his identity and his title to the livestock which he offers for sale. We cannot assume that Congress enacted the Packers and Stockyards Act to protect the operation of stockyards for handling property that has been stolen or obtained by fraud. The Act unquestionably makes it the duty of market agencies to furnish 'upon reasonable request' without discrimination reasonable stockyard services. *But to refuse to cooperate with a criminal in his crime is not 'wrongful discrimination'. Nor is a request that an agency dispose of property stolen or fraudulently obtained a 'reasonable request'.*"

Other cases wherein the Packers and Stockyards Act was passed on and where the courts followed the decision in *Mason City Production Credit Ass'n v. Sig Ellingson & Co.*, supra, was followed are: *First National Bank of Pipestone v. Siman* (S. D.), 289 N. W. 416, and *Moderie v. Schmidt* (Wash.), 108 Pac. (2d) 331.

In *Carnes v. Saint Paul Union Stock Yards Co.*, 175 Minn. 294, 221 N. W. 20, the plaintiff brought an action for an injunction to restrain the defendant from preventing the plaintiff from carrying on a commission business or accepting employment in that line in the stockyards of defendant at South Saint Paul and for damages for having been so prevented. The defendant in its counterclaim asked that the plaintiff be permanently enjoined from operating a market agency upon defendant's property and from being employed in such an agency. There was a judgment for the defendant. In that case the court, in part, said:

> "The defendant's stockyards are devoted to a public use (citing cases). Still such institutions may, without incurring liability, deny the use of their facilities to dishonest dealers and so protect the general public. Dishonest traders should not be permitted to do business in the yards. The plaintiff claims that under the Packers and Stockyards Act of 1921, all control is with the federal authorities. In Carnes v. St. Paul Union Stock Yards Co., 164 Minn. 457, 205 N. W. 630, 206 N. W. 396, we held that the district court had competent jurisdiction to sustain the authority of the defendant in excluding those engaged in dishonest practices."

In *Callaway, et al. v. Atchison, T. & S. F. Ry. Co.* (8 C. C. A.), 35 F. (2d) 319, the action was brought by the railway company, the delivering carrier, against the plaintiff, et al., to recover an alleged undercharge for carriage in the sum of $18.70. The carriage consisted of cattle shipped from Texas to appellant. On arrival $135.50 was paid for the carriage. Subsequently it was learned that the lawful charge was $154.20, of which payment was refused.

The commission company defended upon the ground that it was a market agency, and that it and the com-

mon carrier were instrumentalities of equal rank in interstate commerce. The market agency claimed it was only an agent of the shipper and could not legally assume responsibility for the obligations of the shipper of this nature.

It was further urged that both parties are trustees for the public and that their obligations under the various acts were balanced by a public policy designed to secure uniformity in charges for selling service.

The court in its opinion held that this contention was without substance. The court said if appellant were not a market agency it would scarcely be claimed that the judgment below should not be affirmed. Also that the court did not think its status as a market agency would relieve it from the obligation. The court further said.

> "If the contention of appellant were to be indulged, the door would be opened to wholesale evasion of the Interstate Commerce Act and a great departure would result from the principle involved. The only hardship to appellant in the instant case results from the incidental insolvency of the consignor, and no pretense could be made that this payment would constitute a rebate, or a departure from the provisions of the Packers and Stockyards Act, and the regulations governing the duties and obligations of a market agency. We cannot agree that a subsequent correction of the freight account between the shipper and his market agency, if warranted by the facts, as in this case, would result in a violation of the provisions of the Packers and Stockyards Act, and be viewed as a rebate. Such a correction in the case of a solvent shipper would occasion no refunding or remittance of any portion of the rates or charges specified as due to market agencies; that could result indirectly only in case of insolvency; but such a contingency would not excuse the market agent from the obligation imposed upon him, or it, by law."
>
> "The judgment below is affirmed.

Point III.

Since the cattle Brackey offered to defendant to sell had been stolen (Record pp. 2-5), the same never became a part of interstate commerce. Therefore, the Packers and Stockyards Act has no application in the case at bar. Interstate commerce includes "purchase, sale and exchange". *County of Mobile v. Kimball,* 102 U. S. 691, 697, 26 L. Ed. 238, 241; *Bowman v. Chicago & N. W. Ry. Co.,* 125 U. S. 465, 485, 8 S. Ct. 689, 698; *Champion v. Ames,* 188 U. S. 321, 351, 23 S. Ct. 321, 325. Since stolen cattle cannot be bought, sold and exchanged the same can not become a part of interstate commerce. In connection with this position, plaintiff calls the court's attention to the following decisions.

In *County of Mobile, etc. v. Kimball,* 102 U. S. 691, 26 L. Ed. 238, there was an attack on the law of Alabama, "to provide for the improvement of the river, bay and harbor of Mobile" upon the ground that it was invalid in that it conflicted with the commercial power vested in Congress. The court in discussing the power of Congress, in part, said, U. S. p. 702, L. Ed. p. 241, top col. 2:

> "Perhaps some of the divergence of views upon this question among former Judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

In *Bowman v. Chicago and N. W. Ry. Co.,* 125 U. S. 465, 8 S. Ct. 689, the action involved the constitutional-

ity of an Iowa law forbidding a common carrier to bring into Iowa any intoxicating liquor unless certain requirements were complied with. The plaintiff complained of the defendant's failure to accept in Illinois liquor for transportation to Marshalltown, Iowa. The plaintiff had not complied with the requirements of the Iowa law. The defendant based its defense on the Iowa law. A demurrer to such defense was overruled and judgment entered against the plaintiff. On appeal the judgment was reversed and the Iowa law held unconstitutional. The court in its opinion among other things said, U. S. p. 489, S. Ct. p. 700:

> "For similar reasons the statute of Iowa under consideration cannot be regarded as a regulation of quarantine, or a sanitary provision for the purpose of protecting the physical health of the community, or a law to prevent the introduction into the state of disease, contagious, infectious, or otherwise. Doubtless, the states have power to provide by law suitable measures to prevent the introduction into the state of articles of trade which, on account of their existing conditions, would bring in and spread disease, etc. * * * *Such articles are not merchantable. They are not legitimate subjects of trade and commerce.* They may be rightly outlawed, etc."

In *Plumley v. Massachusetts*, 155 U. S. 461, 15 S. Ct. 154, the plaintiff was convicted upon the charge of having sold oleomargarine in violation of the laws of the state of Massachusetts. The oleomargarine was shipped from Illinois. The plaintiff was the agent of the manufacturer of the oleomargarine. The plaintiff attacked the constitutionality of the law. The court in that case, in part, said, U. S. p. 471, S. Ct. p. 158:

> "In none of the above cases is there to be found a suggestion or intimation that the constitution of the United States took from the state the power of preventing deception and fraud in the sale, within

their respective limits, of articles, in whatever state manufactured, *or that that instrument secured to anyone the privilege of committing a wrong against society.* * * *

"If there be any subject over which it would seem the state ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed, was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products."

U. S. p. 478, S. Ct. p. 160:

"In Railroad Co. v. Husen, above cited, the court, speaking generally said that the police power of a state extended to the making of regulations 'promotive of domestic order, morals, health, and safety'. It was there held, among other things, to be 'within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others', and that 'the police powers of a state justify the adoption of precautionary measures against social evil', and the enactment of such laws as would have 'immediate connection with the protection of persons and property against the noxious acts of others'."

U. S. p. 479, S. Ct. p. 161:

"The constitution of the United States does not secure to anyone the privilege of defrauding the public."

In *Schollenberger v. Commonwealth* (Pa.), 171 U. S. 1, 18 S. Ct. 757, the case grew out of the sale of oleomargarine in violation of the laws of Pennsylvania. The plaintiff as agent of a Rhode Island manufacturer sold the oleomargarine in Pennsylvania. The court after discussing several cases said, U. S. p. 14, S. Ct. p. 762, bottom col. 1:

"Conceding the fact, we yet deny the right of a state to absolutely prohibit the introduction within

its borders of an article of commerce which is not adulterated, and which in its pure state is helpful, simply because such an article, in the course of its manufacture may be adulterated by dishonest manufacturers for the purpose of fraud or illegal gains. *The bad articles may be prohibited, but not the pure and healthy ones.*

"In the execution of its police powers, we admit the right of a state to enact such legislation as it may deem proper, even in regard to articles in interstate commerce for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state."

U. S. pp. 17-18, S. Ct. p. 763, col. 2:

"The court held that under the statute, the party was only forbidden to practice in such matters a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food, and that it compels the sale of oleomargarine for what it really is by preventing its sale for what it is not; *the term 'commerce among the states' did not mean a recognition of a right to practice a fraud upon the public in the sale of an article* even if it had become the subject of trade in different parts of the country. It was said that the constitution of the United States did not take from the state the power of preventing deception and fraud in the sale within their respective limits of articles, in whatever state manufactured, *and that that instrument did not secure to anyone the privilege of permitting a wrong against society.*"

In *Sligh v. Kirkwood*, 237 U. S. 52, 35 S. Ct. 501, the court passed on the constitutionality of a Florida law that made it unlawful for anyone to sell, offer for sale, ship or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption. The court, in part, said:

> "The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. *Such articles, it has been declared by this court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution.*
>
> "Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state."

In *Ziffrin, Inc. v. Reeves,* 308 U. S. 132, 60 S. Ct. 163, the appellant licensed to operate as a contract carrier under the Federal Motor Carrier Act, claimed the right to transport whiskey from Kentucky Distillers to consignees in Chicago without complying with the laws of Kentucky. Ziffrin, Inc., brought suit in Federal District Court in Kentucky to restrain the officers of Kentucky from enforcing the contraband and penal provisions of the Kentucky law. The District Court three judges sitting sustained a motion to dismiss. A direct appeal brought the case to the Supreme Court. Among other things urged were that intoxicating liquors are legitimate articles of interstate commerce unless Federal Law has declared otherwise. Also that interstate commerce includes both importation of property within a state and exportation therefrom. The court in its opinion after referring to and discussing the Twenty-first Amendment to the United States Constitution, in part, said:

> "Kentucky has seen fit to permit manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are not unreasonable and are clearly appropriate for ef-

fectuating the policy of limiting traffic in order to minimize well known evils, and secure payment of revenue. *The statute declares whiskey removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article of commerce.* Sligh v. Kirkwood, 237 U. S. 52, 59, 35 S. Ct. 501, 502, 59 L. Ed. 835; Clason v. Indiana, 306 U. S. 439, 59 S. Ct. 609, 83 L. Ed. 858.

"In effect we are asked by injunction to allow a distiller to do what the statute prohibits—deliver to an unauthorized carrier. Also to enable a carrier to do what it is prohibited from doing—receive and transport within the state.

"The doctrine of that case has been often applied. Geer v. Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793; Rippey v. Texas, 193 U. S. 504, 509, 24 S. Ct. 516, 517, 48 L. Ed. 767; Hudson Water Co. v. McCarter, 209 U. S. 349, 357, 28 S. Ct. 529, 532, 52 L. Ed. 828, 14 Ann. Cas. 560; *'A man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end';* Sligh v. Kirkwood, 237 U. S. 52, 35 S. Ct. 501, 59 L. Ed. 835; State Board of Equalization v. Young's Market Co., 299 U. S. 59, 63, 57 S. Ct. 77, 78, 81 L. Ed. 38; Clason v. Indiana, 306 U. S. 439, 59 S. Ct. 609, 83 L. Ed. 858.

"The two cases last cited recognize that the state may decline to consider certain noxious things legitimate articles of commerce, and inhibit their transportation. Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband.

"We cannot accept appellant's contention that because whiskey is intended for transportation beyond the state lines the distiller may disregard the inhibitions of the statute by delivery to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity."

The courts, as appears in the foregoing quotations, thus have said that the Packers and Stockyards Act does not require a market agency to sell stolen cattle, or cattle obtained by fraud, or cattle to which the title is defective. This is but another way of saying that such cattle were not legitimate subjects of trade and commerce, and therefore not within the coverage of Interstate Commerce.

It is respectfully submitted the petition for certiorari should be denied.

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